Supreme Court, U.S.
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No. ____

In the Supreme Court of the United States

A.S. GOLDMEN & COMPANY, INC.

Petitioner,

v.

NEW JERSEY BUREAU OF SECURITIES

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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204 pp

QUESTIONS PRESENTED

1. Does Section 60 of the New Jersey Uniform Securities Law, N.J. STAT. ANN. § 49:3-60 ("Section 60"), a state securities registration statute — as applied by the New Jersey Bureau of Securities (the "Bureau") to prohibit non-fraudulent sales of securities that are neither registered nor exempt from registration in New Jersey, to residents of states (other than New Jersey) in which the securities have been qualified for sale — impose a burden on interstate commerce that is excessive in relation to its putative local benefits, and therefore violate the Commerce Clause of the United States Constitution?

2. Does Section 60 — as applied by the Bureau to prohibit non-fraudulent sales of securities that are neither registered nor exempt from registration in New Jersey, to residents of states (other than New Jersey) in which the securities have been qualified for sale — directly burden interstate commerce and therefore violate the Commerce Clause of the United States Constitution?

LIST OF PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

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Division of Law
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Trenton, NJ 08625

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Respondent in the court below
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The Galleria, Building 1, Second Floor
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(A.S. Goldmen has no parent companies or subsidiaries)

United States Securities and Exchange Commission
Amicus Curiæ in the court below
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Washington, DC 20549

North American Securities Administrators Association, Inc.
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TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE 1

STATEMENT OF THE CASE 2

A. Preliminary Statement 2

B. Factual and Procedural Background 4

C. The Decision of the Court of Appeals 10

(continued)

TABLE OF CONTENTS (continued)

Page

Argument 14

I. **CERTIORARI SHOULD BE GRANTED BECAUSE THE MAJORITY OPINION DIRECTLY CONFLICTS WITH SUPREME COURT DECISIONS, INCLUDING *PIKE*, BY APPLYING A NEW TEST FOR DETERMINING THE CONSTITUTIONALITY OF A STATE REGULATION THAT INDIRECTLY BURDENS INTERSTATE COMMERCE** 14

A. The Question is a Substantial and Important One 14

B. The Majority Opinion Radically Departs from the Established Rule of *Pike* 15

II. **CERTIORARI SHOULD BE GRANTED BECAUSE THE MAJORITY OPINION DIRECTLY CONFLICTS WITH SUPREME COURT DECISIONS HOLDING THAT A STATE REGULATION THAT DIRECTLY REGULATES INTERSTATE COMMERCE IS *PER SE* UNCONSTITUTIONAL** 21

A. The Question is a Substantial and Important One 21

(continued)

TABLE OF CONTENTS (continued)

Page

B. The Majority Opinion Below Radically Departs from the Well-Established Rule that a State Regulation that Directly Regulates Interstate Commerce is Unconstitutional *Per Se* . . 22

CONCLUSION 30

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTION

U.S. Const. art. I, § 8, cl. 3 . . . . . passim

CASES

Arizona Corp. Comm'n. v. *Media Prods., Inc.*, 158 Ariz. 463, 763 P.2d 527 (Ariz. App. 1988) . . . 26-28

Baldwin v. *G.A.F. Seelig*, 294 U.S. 511, 55 S. Ct. 497 (1935) 11, 23

Bibb v. *Navajo Freight Lines, Inc.*, 359 U.S. 520, 79 S.Ct. 962 (1959) 24

Brown-Forman Distillers Corp. v. *New York State Liquor Auth.*, 476 U.S. 573, 106 S.Ct. 2080 (1986) . passim

CTS Corp. v. *Dynamics Corp.*, 481 U.S. 69, 107 S.Ct. 1637 (1987) 16

Caldwell v. *Souix Falls Stock Yards Co.*, 242 U.S. 559, 37 S. Ct. 224 (1917) 11

Edgar v. *MITE Corp.*, 457 U.S. 624, 102 S.Ct. 2629 (1982) 2, 16, 19, 24

Foster-Fountain Packing Co. v. *Haydel*,
278 U.S. 1, 49 S.Ct. 1 (1928) 29

Hall v. *Geiger-Jones Co.*,
242 U.S. 539, 37 S. Ct. 217 (1917) 11, 16

Healy v. *The Beer Institute*,
491 U.S. 324, 109 S. Ct. 2491 (1989) 11, 22 ,23, 28

Instructional Systems, Inc. v. *Computer Curriculum Corp.*, 35 F.3d 813 (3d Cir. 1994) 3, 25

Johnson v. *Haydel*, 278 U.S. 16, 49 S.Ct. 6 (1928) 29

Kassel v. *Consol. Freightways Corp.*,
450 U.S. 662, 101 S.Ct. 1309 (1981) 24

Lemke v. *Farmers Grain Co.*,
258 U.S. 50, 42 S. Ct. 244 (1922) 23

Merrick v. *N.W. Halsey & Co.*,
242 U.S. 568, 37 S. Ct. 227 (1917) 11, 16

Philadelphia v. *New Jersey*,
437 U.S. 617, 98 S.Ct. 2531 (1978) 2

Pike v. *Bruce Church, Inc.*,
397 U.S. 137, 90 S.Ct. 844 (1970) . . . . . passim

Raymond Motor Transp., Inc. v. *Rice*,
434 U.S. 429, 98 S. Ct. 787 (1978) 3, 4, 17

Shafer v. *Farmers Grain Co.*,
268 U.S. 189, 45 S.Ct. 481 (1925) 2, 28

South-Central Timber Dev., Inc. v. *Wunnicke*,
467 U.S. 82, 104 S.Ct. 2237 (1984) 29

Southern Pac. Co. v. *Arizona*,
325 U.S. 761, 65 S.Ct. 1515 (1945) 24

Toomer v. *Witsell*,
334 U.S. 385, 68 S.Ct. 1156 (1948) 29

STATUTES

N.J. Stat. Ann. § 49:3-60 ..... passim

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 6

PETITION FOR A WRIT OF CERTIORARI

A.S. Goldmen & Company, Inc. ("A.S. Goldmen") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The majority and dissenting opinions of the divided panel of the court of appeals are reported at 163 F.3d 780 and 789. App. 3a, 21a. The opinion of the district court granting A.S. Goldmen's cross motion for summary judgment, and denying the Bureau's cross motion for summary judgment, is not officially reported. App. 32a.

JURISDICTION

On January 7, 1999, the court of appeals entered judgment reversing the judgment of the district court. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

On January 20, 1999, A.S. Goldmen petitioned the Court of Appeals for rehearing, or in the alternative, for rehearing en banc. The court of appeals denied the petition for rehearing on February 9, 1999. App. 89a.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

This case involves the Commerce Clause of the United States Constitution, U.S. CONST. art. I, § 8, cl. 3, as well as Section 60 of the New Jersey Uniform Securities Laws, N.J. STAT. ANN. § 49:3-60. The text of these provisions is set forth at page 91a of the Appendix.

STATEMENT OF THE CASE

A. Preliminary Statement

This case presents a narrow issue: whether a state's efforts to regulate the sale of securities to residents of other states in which those securities have been approved for sale burdens interstate commerce and violates the Commerce Clause of the United States Constitution. The district court (Debevoise, D.J.) ruled that the statute in question, Section 60 of the New Jersey Uniform Securities Laws, as applied by the Bureau, unlawfully burdens interstate commerce, and struck down the statute as violative of the Commerce Clause. A divided panel of the United States Court of Appeals for the Third Circuit reversed the district court's judgment.

The majority opinion of the federal court of appeals is flatly inconsistent with decades of established Supreme Court precedent. This Court has firmly established a two-tiered test for determining the constitutionality of a state regulation, like Section 60, which concededly imposes burdens on interstate commerce. Under the first tier of this test, a state statute that directly burdens or discriminates against interstate commerce is *per se* unconstitutional, and is struck down without further inquiry. *See Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573, 578-79, 106 S.Ct. 2080, 2084 (1986); *Edgar* v. *MITE Corp.*, 457 U.S. 624, 640-43, 102 S.Ct. 2629, 2639-2641 (1982); *Philadelphia* v. *New Jersey*, 437 U.S. 617, 623-24, 98 S.Ct. 2531, 2535-2536 (1978); *Shafer* v. *Farmers' Grain Co.*, 268 U.S. 189, 45 S.Ct. 481 (1925). Under the second tier, the constitutionality of regulations that indirectly burden interstate commerce is evaluated under a balancing test. A state statute that indirectly burdens interstate commerce is struck down if the burdens that it imposes on interstate commerce are excessive

in relation to the its local benefits. *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844 (1970).

Lower courts for decades have applied this two-tiered test when considering the constitutionality of state regulations that impose burdens on interstate commerce. *See, e.g., Instructional Systems, Inc.* v. *Computer Curriculum Corp.*, 35 F.3d 813, 824 (3d Cir. 1994) (beginning its analysis of a dormant Commerce Clause question by stating that "[t]he Supreme Court has articulated two tiers of scrutiny in analyzing statutes that regulate interstate commerce"). Until the majority opinion here, courts always have applied the two-tiered test: a state statute that directly regulates or discriminates against interstate commerce is *per se* unconstitutional, while a statute that only indirectly regulates interstate commerce is subject to the *Pike* balancing test.

The majority opinion of the court of appeals, however, completely disregards the two-tiered test, and does so without addressing the unbroken line of Supreme Court precedent that established it. The majority opinion never addressed the question of whether the Bureau's application of Section 60 directly regulates interstate commerce, and never balanced the burden that Section 60 imposed on interstate commerce against its purported local benefits. Ignoring both analyses, the majority opinion instead analyzed the "territoriality" of A.S. Goldmen's transactions, and concluded that New Jersey could constitutionally regulate the "half" of the transaction that took place in New Jersey, provided that such an application of the statute furthered some local interest.

The majority's analysis is directly inconsistent with this Court's dormant Commerce Clause jurisprudence. The mere assertion — indeed even the finding — of a legitimate state interest is not sufficient to make constitutional a state regulation that burdens interstate commerce. *See Raymond*

Motor Transp., Inc. v. *Rice*, 434 U.S. 429, 443, 98 S.Ct. 787, 795 (1978) (refusing to "accept the State's contention that the inquiry under the Commerce Clause is ended without a weighting of the asserted [state interest] against the degree of interference with interstate commerce.") Rather, a court must engage in "a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce." *Id* at 441, 794. The majority below did not engage in such an inquiry.

The majority below thus departed from this Court's established test for determining the constitutionality of a state regulation that burdens interstate commerce. We respectfully urge the Court to grant certiorari in this case.

B. Factual and Procedural Background

On October 29, 1996, A.S. Goldmen, a securities broker-dealer and investment bank, commenced an initial public offering of stock of Imatec, Ltd. ("Imatec"). Imatec is in the business of developing, designing, marketing and licensing image enhancement technologies for application in such markets as medical imaging, graphic arts, computers, cinematography, television and video. App. 149a. At the time of the offering, A.S. Goldmen's sole office was located in New Jersey.

The Imatec offering was registered with the Securities and Exchange Commission and qualified for sale to residents of sixteen states pursuant to the securities registration requirements of those jurisdictions. App. 140a. The Imatec offering documents properly identified the jurisdictions in which Imatec securities could be offered for sale. App. 152-153a. Imatec securities were neither registered for sale nor exempt from registration in New Jersey.

On or about May 21, 1996, prior to the effective date of the offering, Imatec filed an application with the New Jersey Bureau of Securities (the "Bureau") to register the Imatec offering in New Jersey. App. 13a. In or about July 1996, during this application process, the Bureau indicated to A.S. Goldmen's counsel that the Bureau was considering issuing a stop order on Imatec's application for registration, based solely on the Bureau's opinion of Imatec's financial condition. App. 138a.

In or about August 1996, Orrick, Herrington & Sutcliffe ("Orrick"), counsel for A.S. Goldmen, requested that the Bureau not issue a stop order on Imatec's application for registration. App. 138a. Orrick and the Bureau then engaged in discussions regarding the possibility of the Bureau issuing a stop order, and particularly regarding the Bureau's stated concern over the financial condition of Imatec.

During these discussions, Orrick advised the Bureau that (1) if a stop order were issued, Imatec would be unable to offer and sell its securities to residents of states in which the securities were qualified for offer or sale, and (2) Imatec intended to offer and sell its securities in those states. App. 125a. The Bureau was aware not only that A.S. Goldmen was Imatec's sole underwriter and that A.S. Goldmen's only office was located in New Jersey App. 62a, but also that A.S. Goldmen intended to offer and sell Imatec securities from its New Jersey office to residents of those states in which the securities were qualified for sale. App. 126a.

On October 23, 1996, as a result of these discussions, Imatec and the Bureau entered into a consent order denying specific exemptions under New Jersey law (the "Consent Order"). App. 93a-98a, 126a. The Consent Order did not state that A.S. Goldmen could not offer or sell Imatec

securities from its New Jersey office to residents of states in which Imatec was qualified for offer or sale. *Id.*

Moreover, during discussions regarding the terms of the Consent Order, the Bureau never expressed to anyone at Orrick the position it advocated to the district court — namely, that the Consent Order would bar sales of Imatec securities from A.S. Goldmen's New Jersey office to residents of those states in which the securities were qualified for offer or sale. App. 126a, 139a. In fact, during these discussions, Orrick specifically advised the Bureau that A.S. Goldmen intended to offer Imatec securities for sale to residents of those states in which such securities were qualified. App. 126a. It was not until November 7, 1996 — 15 days after the Consent Order was entered into and 9 days after A.S. Goldmen began making such sales — that Orrick first learned that the Bureau was taking the position that the Consent Order barred sales of Imatec securities to residents of those states where the securities had been qualified. *Id.*

On November 12, 1996, The Bureau issued an order to cease and desist against A.S. Goldmen. App. 99a-104a. The Bureau thereby ordered A.S. Goldmen to cease and desist "from the solicitation of customers, offer and sale of Imatec in or from the State of New Jersey to any members of the public." App. 102a-103a.

On November 12, 1996, A.S. Goldmen commenced a declaratory judgment action in the United States District Court for the District of New Jersey.[1/] In that action, A.S. Goldmen sought, in relevant part, a finding that Section 60 of the New Jersey Uniform Securities Law violates the

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[1/] Jurisdiction in the district court was based on 28 U.S.C. §1331, insofar as the action involved matters arising under the United States Constitution.

Commerce Clause of the United States Constitution, as applied to securities that were neither registered nor exempt from registration in New Jersey and were offered or sold by brokers located in New Jersey to residents of states (other than New Jersey) whose securities regulators had qualified the securities for sale. App. 105a.

On November 14, 1996, the district court entered an order temporarily restraining the Bureau from taking any action that prohibited A.S. Goldmen, its employees and agents from soliciting, offering or selling Imatec securities to or from persons residing outside of New Jersey, pending full consideration of the matter. App. 41a-43a.

On November 20, 1996, the district court granted A.S. Goldmen's application for a preliminary injunction. The Court entered an order (1) finding A.S. Goldmen likely to succeed on the merits of its claim that the Bureau's proposed application of Section 60 of the New Jersey Uniform Securities Law, which would prohibit brokers located in New Jersey from soliciting, offering or selling securities that are neither registered nor exempt from registration in New Jersey to residents of states (other than New Jersey) in which the securities are qualified for sale, violates the Commerce Clause of the United States Constitution; and (2) preliminarily enjoining the Bureau from taking any action that would prohibit A.S. Goldmen and its employees and agents from soliciting, offering or selling securities that are neither registered nor exempt from registration in New Jersey to residents of states (other than New Jersey) in which the securities are qualified for sale.

At the conclusion of discovery, the Bureau and A.S. Goldmen cross-moved for summary judgment. App. 118a, 121a. By decision dated August 22, 1997, Judge Debevoise granted A.S. Goldmen's motion for summary judgment.

At the outset of its decision, the district court explained that it would review the constitutionality of the Bureau's application of Section 60 by applying this Court's well-established two-tiered test for reviewing state regulations that burden interstate commerce. Judge Debevoise wrote:

> When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without any further inquiry. When, however, a statute only has an indirect effect on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.

App. 35a, quoting *Brown-Forman*, 476 U.S. at 579, 106 S.Ct. at 2084.

Citing Supreme Court authority, the district court explained that when determining whether a state statute "directly regulates" commerce, "the critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." App. 36a (internal quotation omitted.) Judge Debevoise pointed out that "[t]he Supreme Court has consistently struck down on Commerce Clause grounds state statutes that apply one state's standards to another state's residents," App. 36a, adding that "the Commerce Clause protects against inconsistent legislation arising from the projection of one state's regulatory regime into the jurisdiction of another." App. 36a.

Applying this law to the facts of A.S. Goldmen's case, the district court concluded that the Bureau's application of Section 60 "effectively seeks to impose New Jersey securities

regulations onto other states." App. 36a. Judge Debevoise reasoned:

> The sales which the Bureau purports to regulate are those of a security which has been registered with the SEC, approved by NASDAQ, and approved by each of the other states in which the securities are to be sold. To allow the Bureau to preclude consumers in other states from receiving solicitations to purchase securities which their own state regulators have deemed appropriate for purchase is, in essence, to allow the Bureau to substitute its own regulatory judgment for that of other states. The Supreme Court has made clear that such an application of state law constitutes a direct burden on interstate commerce.

App. 36a-37a. The district court ruled that the Bureau's application of Section 60 should be struck down under the foregoing analysis, without further inquiry. *Id.*

The district court also ruled, in the alternative, that even if it were "assumed that the Bureau's application of Section 60 does not directly burden interstate commerce, the statute still violates the dormant Commerce Clause because the burden it imposes on interstate commerce is clearly excessive in relation to the putative local benefits." App. 37a, citing *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct 844 (1970). The district court found in this regard that the two state interests proffered by New Jersey — protecting New Jersey's commercial reputation against fraud and protecting in-state consumers against securities fraud — are insubstantial under the circumstances of this case. App. 37a-38a. First, the district court emphasized that "[t]he Bureau does not advance a single allegation of fraud against plaintiff." App. 37a. Second, "the Bureau is reaching out to prohibit a sale, which will not be made to New Jersey

residents, which takes place in a national securities market, and which is regulated by each state to protect its own citizens." *Id.*

Finally, the district court found that there exist "less intrusive measures available to the Bureau to accomplish its goals." App. 37a. It reasoned that if the Bureau truly wished to monitor the sales of securities to New Jersey residents in the secondary market, it could take "several measures short of prohibiting the solicitation of residents of states in which they are qualified for sale." *Id.* The court identified two such measures: (1) "the Bureau could require local brokers that intend to sell securities from New Jersey to residents of states other than New Jersey to inform the Bureau of such sales"; and (2) the Bureau could "monitor the sale of securities to residents of New Jersey in the secondary market pursuant to its authority as a state regulatory and investigating agency." App. 38a.

The district court thus concluded that even if analyzed under the balancing test applied to regulations that only indirectly burden interstate commerce, the Bureau's application of Section 60 still plainly violated the Commerce Clause "because the burden it imposes on interstate commerce clearly exceeds the benefits to New Jersey." App. 38a.

C. The Decision of the Court of Appeals

The Bureau appealed the district court's ruling to the United States Court of Appeals for the Third Circuit. On January 7, 1999, a divided panel of the court of appeals reversed the judgment of the district court, and held that the Bureau's application of Section 60 did not violate the Commerce Clause.

The majority opinion did not refer to, or apply, the two-tiered standard of review established by this Court. Instead, the majority relied on authority from this Court holding that courts may invalidate state regulations whose extraterritorial impact has the effect of "control[ling] conduct beyond the boundaries of the state." App. 11a, quoting *Healy* v. *The Beer Institute*, 491 U.S. 324, 333, 109 S.Ct. 2491, 2499 (1989), and citing *Baldwin* v. *G.A.F. Seelig*, 294 U.S. 511, 523, 55 S.Ct. 497, 500 (1935). The majority posited that although "a state may not attempt to regulate commerce that takes place 'wholly outside' of its borders ... states are permitted to regulate in-state components of interstate transactions so long as the regulation furthers legitimate in-state interests." App. 11a-12a, citing *Hall* v. *Geiger-Jones Co.*, 242 U.S. 539, 37 S.Ct. 217 (1917) and its companion cases, *Caldwell* v. *Souix Falls Stock Yards Co.*, 242 U.S. 559, 37 S.Ct. 224 (1917) and *Merrick* v. *N.W. Halsey & Co.*, 242 U.S. 568, 37 S.Ct. 227 (1917).

Thus, under the standard of review articulated by the majority, "the constitutionality of state regulations of interstate commerce depends largely on the territorial scope of the transaction that the state law seeks to regulate." App. 13a. The majority summarized its approach as follows:

> If the transaction to be regulated occurs "wholly outside" the boundaries of the state, the regulation is unconstitutional. If the transaction occurs "within" the boundaries of the state, it is constitutional so long as the regulation furthers legitimate in-state interests.

App. 13a (internal citations omitted.)

The majority then launched into an elaborate discussion of the "territoriality" of A.S. Goldmen's sales of Imatec securities to customers in states other than New

Jersey. Under this analysis, which relied heavily on contract law, when A.S. Goldmen sold Imatec securities to a customer in a state other than New Jersey, elements of that transaction occurred in both New Jersey and the state in which the purchaser resided. App. 15a-16a. The majority then reasoned that since elements of such a transaction took place in New Jersey, Section 60 "simply allows the Bureau to regulate its 'half' of the transaction — the offer that occurs *entirely* within the state of New Jersey." App. 16a (emphasis in original).

Having concluded that Section 60 regulates "the in-state component of an interstate transaction," the majority applied its standard of review and considered whether Section 60 reasonably furthers a "legitimate interest." App. 16a-19a. The majority reasoned that the Bureau's application of Section 60 furthered two "legitimate state interests": 1) New Jersey's interest in "preserving the reputation of New Jersey broker-dealers"; and 2) New Jersey's interest in "protecting New Jersey buyers in the secondary market." App. 19a.

The majority thus concluded that because the Bureau's application of Section 60 "regulates the in-state portion of an interstate transaction and furthers legitimate instate interests," the Bureau's application "does not violate the dormant [C]ommerce [C]lause." App. 19a.

Judge McKee dissented. He rejected the majority's approach of analyzing New Jersey's interest in regulating the "half" of the transaction that occurred within New Jersey's boundaries. The correct approach, Judge McKee reasoned, is to focus on the impact upon interstate commerce imposed by the Bureau's application of Section 60. App. 24a. He reasoned that in view of the conflict between the Bureau's application of Section 60 and the other states' qualification of Imatec securities, "[t]he question is not which state's

regulations will prevail, but whether either state has an interest of sufficient gravity to allow it to enforce its regulations in a manner that so effects interstate commerce." *Id.* The majority's emphasis on territoriality, Judge McKee concluded, "fails to afford proper recognition of the overriding federal interest that must control under a Commerce Clause analysis." *Id.*

Judge McKee also disagreed with the majority's conclusion that the Bureau's application of Section 60 furthered a legitimate state interest. He pointed out that although caselaw recognizes a state's interest in combating fraud, the majority in this case is "far too quick to allow New Jersey to proceed as though it had established a fraud it is not even alleging." App. 26a. Judge McKee maintained that the court "ought not rest our decision here upon concerns that arise from insinuations and implications about unproven, and unalleged, conduct on the part of Goldmen." *Id.*

The dissent concluded by following this Court's mandate in *Pike* and balancing New Jersey's purported interest in the Bureau's application of Section 60 against the federal interest in not imposing burdens on interstate commerce. App. 27a-31a. Noting that the Bureau's application of Section 60 imposes "an absolute ban on interstate commerce that consists of soliciting individual buyers of Imatec stock from New Jersey," Judge McKee reasoned that New Jersey needed to demonstrate that its interests are furthered in a way that justifies this substantial burden on interstate commerce. App. 30a. Judge McKee concluded that, absent a showing that A.S. Goldmen "is engaging in false or misleading sales practices or fraud," the record does not support a conclusion that New Jersey's interests in the Bureau's application of Section 60 are sufficiently strong to justify the substantial burden on

interstate commerce imposed by the Bureau's application of Section 60. *Id.*

On January 20, 1999, A.S. Goldmen petitioned the Court of Appeals for rehearing, or in the alternative, for rehearing en banc. The court of appeals denied the petition for rehearing on February 9, 1999. App. 89a.

Argument

I.

CERTIORARI SHOULD BE GRANTED BECAUSE THE MAJORITY OPINION DIRECTLY CONFLICTS WITH SUPREME COURT DECISIONS, INCLUDING *PIKE*, BY APPLYING A NEW TEST FOR DETERMINING THE CONSTITUTIONALITY OF A STATE REGULATION THAT INDIRECTLY BURDENS INTERSTATE COMMERCE

A. The Question is a Substantial and Important One

The importance of the first question presented in this case — whether the Bureau's application of Section 60 violated the dormant Commerce Clause by imposing a burden on interstate commerce that is excessive in relation to its putative local benefits — is evident from the proceedings in the court of appeals. The court of appeals was sharply divided. Judge McKee's dissent pointed out the fundamental flaw in the majority's approach: that the majority, when considering New Jersey's interests in the Bureau's application of Section 60, considered those interests in isolation, without balancing those interests against the burden that the Bureau's application of Section 60 imposed on interstate commerce. The majority's total failure to balance New Jersey's interests against the burden on interstate commerce, coupled with the

majority's formulation of a new test for determining the constitutionality of a state regulation that burdens interstate commerce, directly conflicts with this Court's decisions in *Pike* and its progeny, which require that a court apply a balancing test when considering the constitutionality of a state regulation that indirectly burdens interstate commerce. *See Pike*, 397 U.S. at 142, 90 S.Ct. at 847.

The importance of the majority's departure from *Pike* cannot be overstated. For almost three decades, federal courts of appeals, without exception, have followed the "two-tiered approach to analyzing state economic regulation under the Commerce Clause," which this Court announced in *Pike* and reaffirmed numerous times subsequently. *See, e.g., Brown-Forman*, 476 U.S. at 578-79, 106 S.Ct. at 2084. The majority's opinion radically departs from this established standard, and replaces it with a test that declares a state regulation constitutional so long as that regulation furthers *any* legitimate state interest, without regard to the extent to which that interest is furthered, and without regard to the extent to which the regulation burdens interstate commerce.

We respectfully submit that the question of whether the majority departed from *Pike*, and reviewed A.S. Goldmen's transactions under a radically different standard, deserves the attention of this Court.

B. The Majority Opinion Radically Departs from the Established Rule of *Pike*

The majority opinion directly conflicts with this Court's decision in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844 (1970). In *Pike*, this Court ruled that when considering the constitutionality, under the Commerce Clause, of a state regulation that indirectly burdens interstate commerce, a court must balance the statute's burden on

interstate commerce against the local interests that the statute purportedly protects. Under *Pike*, such a regulation must be stricken down as unconstitutional if "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* at 142, 847.

The majority opinion disregards the balancing analysis mandated by *Pike* to assess the constitutionality of the Bureau's application of Section 60. Instead, the majority adopts a completely different legal framework that is not appropriate to Commerce Clause analysis. The majority expressed its new standard as follows: "[S]tates are permitted to regulate in-state components of interstate transactions so long as the regulation furthers legitimate state interests." App. 12a, citing *Hall* v. *Geiger-Jones Co.*, 242 U.S. 539, 37 S.Ct. 217 (1917) and *Merrick* v. *N.W. Halsey & Co.*, 242 U.S. 568, 37 S.Ct. 227 (1917). Put somewhat differently, the majority stated that "[i]f the transaction occurs 'within' the boundaries of the state, it is constitutional so long as the regulation furthers legitimate in-state interests." App. 13a, citing *Edgar* v. *MITE Corp.*, 457 U.S. 624, 642, 102 S.Ct. 2629, 2641 (1982) and *CTS Corp.* v. *Dynamics Corp.*, 481 U.S. 69, 93, 107 S.Ct. 1637, 1651-52 (1987).[2/]

[2/] The cases the majority cites do not support the majority's new formulation of the test for constitutionality under the Commerce Clause. *Merrick* and *Hall* are inapposite. *Merrick* did not address whether a statute violated the Commerce Clause, while *Hall* involved a regulation requiring a license to sell securities *within* a state, as opposed to A.S. Goldmen's sales of Imatec securities *across* state lines. *See* Dissent at 22-23, App. 22a-23a. *Edgar* and *Hall*, meanwhile, support the argument that the *Pike* balancing test should be applied. *Edgar* explicitly states that when a state statute indirectly burdens interstate commerce, a court must weigh the burden on commerce against the purported state interests. *See Edgar*, 457 U.S. at 643, 102 S.Ct. at 2641. The Court in *CTS Corp.* also undertook this balancing analysis. *See CTS Corp.*, 481 U.S. at 89-93, 107 S.Ct. at

(continued...)

Applying its new test for determining constitutionality under the dormant Commerce Clause, the majority considered *only* New Jersey's purported interests in its application of Section 60, *without* weighing those interests against the burdens imposed on interstate commerce, as required by *Pike* and its progeny. This Court has explicitly stated that no matter how strong a state's interests appear to be, a court considering the constitutionality of that regulation under the dormant Commerce Clause must balance those state interests against the burdens imposed on interstate commerce.[3/] Yet after identifying two state interests that it believes were furthered by the Bureau's application of Section 60, App. 17a-19a, the majority simply concludes that the Bureau's application of Section 60 does not violate the Commerce Clause, without balancing these purported interests against the burdens that this application of Section 60 imposes on interstate commerce. App. 19a.

Judge McKee's dissent recognizes that the majority failed to undertake a *Pike* balancing analysis. Judge McKee wrote: "The majority's analysis focuses only upon the interest of the inconsistent regulatory schemes in the relevant 'competing' states. That approach fails to afford proper recognition of the overriding federal interest that must control under a Commerce Clause analysis." App. 24a.

[2/] (...continued)
1649-52.

[3/] Even when considering state statutes in contexts where federal deference to local regulation has long been recognized, such as motor vehicle safety, this Court has stated that it "cannot accept [the] contention that the inquiry under the Commerce Clause is ended without a weighing of the asserted [state interest] against the degree of interference with interstate commerce." *Raymond Motor Transp., Inc.* v. *Rice*, 434 U.S. 429, 443, 98 S.Ct. 787, 795 (1978).

The burdens that the Bureau's application of Section 60 imposes on interstate commerce, which the majority wholly ignored, are substantial. The Bureau's application of Section 60 amounts to an extraterritorial imposition of New Jersey's regulatory judgment upon the residents of sixteen other states, whose own regulators expressly reached the opposite regulatory judgment when they qualified Imatec securities for sale in their states. As the dissent points out, "[e]ach of those states could have enacted a regulatory scheme that only allowed the sale of securities properly registered in the state where the seller maintains its principal office," yet none of those sixteen states chose to do so. App. 30a. The majority's holding thus "has the practical effect of reading § 60 into the regulations of each of those states despite the absence of such a restriction in the regulatory schemes of the 16 states." Dissent at 30, App. 30a.

This extraterritorial effect is itself so profound that it is sufficient to invalidate the Bureau's application of Section 60 as unconstitutional under the *per se* rule set forth by this Court in *Brown-Forman*. *See* Section II, *infra*. Yet the majority did not follow *Brown-Forman*'s mandate to consider whether this extraterritorial effect constitutes a direct burden on interstate commerce; nor did it follow *Pike*'s mandate to balance this extraterritorial effect against New Jersey's purported state interests. Instead, the majority completely ignored the extraterritorial effect of the Bureau's application of Section 60. The majority did so through its analysis of the "territoriality" of A.S. Goldmen's transactions. Under this analysis, the majority concluded that the Bureau's use of Section 60 to effect an outright ban on interstate sales of Imatec merely allowed the Bureau to regulate "its 'half' of the transaction" that "occurs *entirely* within the state of New Jersey." App. 16a (emphasis in original). The dissent correctly describes this conclusion as "misleading" and "inaccurate," in light of the fact that the Bureau's application

of Section 60 "has the practical effect of halting sales to individual purchasers" in other states. App. 23a.

Yet even if the majority were correct in characterizing the Bureau's application of Section 60 as regulating the "half" of a transaction that is "entirely within the state of New Jersey," the court of appeals still would have been obligated under *Pike* to balance the "incidental" or "indirect" effects of this regulation on interstate commerce against the state interests that the regulation purportedly furthers. *See, e.g., Edgar*, 457 U.S. at 643, 102 S.Ct. at 2641 ("even when a state statute regulates interstate commerce indirectly, the burden imposed on that commerce must not be excessive in relation to the local interests served by the statute"); *Brown-Forman*, 476 U.S. at 579, 106 S.Ct. at 2084 (even when "a statute has only indirect effects on interstate commerce" a court must examine "whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits").

Under an unbroken line of Supreme Court precedent, New Jersey's interest in the Bureau's application of Section 60 must be balanced against the burden imposed by the statute's extraterritorial effect, even if that extraterritorial effect is only "incidental" or "indirect." *See, e.g., Edgar*, 457 U.S. at 643-44, 102 S.Ct. at 2641-42 (holding that an Illinois anti-takeover law was unconstitutional under the *Pike* balancing test because the burden of the statute's "nationwide reach," which "give[s] Illinois the power to determine whether a tender offer may proceed anywhere," outweighed the local benefits). It is this heavy burden on interstate commerce that *Pike* and its progeny require the court of appeals to balance against New Jersey's purported state interests.

The majority's failure to balance New Jersey's purported state interests against the burden that Section 60 imposes on interstate commerce through its extraterritorial effect thus directly conflicts with *Pike* and its progeny. The majority opinion replaces the *Pike* test with one that decrees that a state regulation, regardless of its burden on interstate commerce, is constitutional so long as the regulation furthers a legitimate state interest. The majority opinion thus removes from the realm of Commerce Clause analysis all cases involving the extraterritorial imposition of state regulations. The majority concedes as much, asserting that this case, and others like it, are "simply beyond the concern of the Commerce Clause." App. 16a. This is flatly inconsistent with this Court's Commerce Clause jurisprudence, under which courts, following *Pike*, have inquired whether state regulations further "interest[s] of sufficient gravity to allow [a state] to enforce its regulations in a manner that so effects interstate commerce." Dissent at 24, App. 24a.

As Judge McKee's dissent points out, "applying § 60 to bar solicitation where a security could otherwise be sold goes to the very heart of the Commerce Clause." *Id.* Yet the majority addressed this issue without regard to this Court's established Commerce Clause jurisprudence, applying instead a new analysis that more closely resembles a conflicts of laws inquiry than it does constitutional analysis. The Court should grant certiorari in this case to correct this radical departure from this Court's established Commerce Clause jurisprudence.

II

CERTIORARI SHOULD BE GRANTED BECAUSE THE MAJORITY OPINION DIRECTLY CONFLICTS WITH SUPREME COURT DECISIONS HOLDING THAT A STATE REGULATION THAT DIRECTLY REGULATES INTERSTATE COMMERCE IS *PER SE* UNCONSTITUTIONAL

A. The Question is a Substantial and Important One

The importance of the second question presented in this case — whether the Bureau's application of Section 60 violated the dormant Commerce Clause by directly burdening interstate commerce — is evident from the proceedings in the court of appeals. The majority opinion disregards this Court's established test for determining whether a state regulation violates the dormant Commerce Clause. Under this Court's two-tiered test for evaluating the constitutionality of a state regulation that burdens interstate commerce, a state regulation that directly regulates interstate commerce is *per se* invalid under the dormant Commerce Clause. *Brown-Forman*, 476 U.S. at 579, 106 S.Ct. at 2084. Yet the majority below ignored this established rule, and instead used its unprecedented analysis of the "territoriality" of A.S. Goldmen's transactions to circumvent the conclusion, mandated by this Court's precedents, that the Bureau's application of Section 60 directly burdens interstate commerce and thus is *per se* unconstitutional.

We respectfully submit that the question of whether the majority departed from the well-established rule of *Brown-Forman* and similar cases, and ignored Section 60's direct regulation of interstate commerce through its analysis of territoriality, deserves the attention of this Court.

B. The Majority Opinion Below Radically Departs from the Well-Established Rule that a State Regulation that Directly Regulates Interstate Commerce is Unconstitutional *Per Se*

The majority opinion directly conflicts with this Court's precedents governing the analysis that a court must undertake when considering whether a state statute or regulation violates the Commerce Clause. This Court consistently has ruled that a state regulation that directly regulates interstate commerce is *per se* invalid under the dormant Commerce Clause. *Brown-Forman*, 476 U.S. at 579, 106 S.Ct. at 2084. In determining whether a state regulation "directly regulates" interstate commerce, the "critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Healy* v. *Beer Inst.*, 491 U.S. 324, 336, 109 S.Ct. 2491, 2499 (1989); *see also Brown-Forman*, 476 U.S. at 582, 106 S.Ct. at 2086 (requiring an individual "to seek regulatory approval in one State before undertaking a transaction in another directly regulates interstate commerce.")

This Court has held that a state regulation is "projected" into another state, and therefore directly burdens interstate commerce, when that regulation "has the 'practical effect' of regulating commerce occurring wholly outside that State's borders." *Healy*, 491 U.S. at 332, 109 S.Ct. at 2497. The "practical effect" of such a regulation "must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States." *Id.* at 336, 2499; *Brown-Forman*, 476 U.S. at 579-80, 106 S.Ct. at 2084-85 (a state may not insist that

consumers in another state surrender whatever advantages their state law provides.)

The district court found that the Bureau's application of Section 60 to prohibit the sale of Imatec securities to residents of states in which the securities had been qualified for sale had the practical effect of regulating commerce occurring wholly outside of New Jersey's borders, and therefore imposed a direct burden on interstate commerce that violated the dormant Commerce Clause. App. 36a-37a.

The majority of the court of appeals reversed, analyzing the "territoriality" of A.S. Goldmen's sales of Imatec securities. The majority reasoned that since some elements of those transactions took place in New Jersey, Section 60 "simply allows the Bureau to regulate its 'half' of the transaction — the offer that occurs *entirely* within the state of New Jersey." App. 16a (emphasis in original). The majority thus distinguished the instant case from cases in which the Supreme Court had struck down regulations that directly burdened interstate commerce, such as *Baldwin* v. *G.A.F. Seelig*, 294 U.S. 511, 55 S.Ct. 497 (1935) and *Lemke* v. *Farmers Grain Co.*, 258 U.S. 50, 42 S.Ct. 244 (1922). App. 11a.

The majority's analysis directly conflicts with this Court's decisions striking down state regulations as *per se* unconstitutional under the Commerce Clause because of their extraterritorial effect. In *Healy*, 491 U.S. at 332, 109 S.Ct. at 2497, this Court explained that a state regulation is "projected" into another state, and therefore directly burdens interstate commerce, when that regulation "has the 'practical effect' of regulating commerce occurring wholly outside that State's borders." In this case, the practical effect of the Bureau's application of Section 60, which bars the sale of Imatec securities from New Jersey into states whose securities

regulators have approved Imatec securities for sale, is that residents of those other states are denied the opportunity to purchase Imatec securities. The regulatory judgment of the Bureau thus supersedes the judgment of securities regulators of sixteen other states.

A regulation with such a blatant extraterritorial effect must be stricken down under this Court's settled precedent. As this Court explained in *Brown-Forman*, 476 U.S. at 582, 106 S.Ct. at 2086, "[f]orcing a merchant to seek regulatory approval in one State before undertaking a transaction in another directly regulates interstate commerce" and thus is *per se* invalid under the Commerce Clause. This Court has repeatedly struck down state regulations — like Section 60 here — that burdened interstate commerce by projecting one state's standards onto other states' residents. *See, e.g.*, *Kassel* v. *Consol. Freightways Corp.*, 450 U.S. 662, 674-78, 101 S.Ct. 1309, 1318-20 (1981) (striking down an Iowa statute prohibiting the use of 65-foot double-trailer trucks in Iowa, because the statute unconstitutionally burdened interstate commerce); *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520, 79 S.Ct. 962 (1959) (striking down an Illinois statute requiring the use of a certain type of rear fender mudguard on trucks); *Southern Pac. Co.* v. *Arizona*, 325 U.S. 761, 65 S.Ct. 1515 (1945) (striking down an Arizona statute limiting the number of cars that could legally be carried on trains operating within the state).

The majority attempts to sidestep this Court's rulings in *Brown-Forman* and *Kassel* by analyzing the "territoriality" of A.S. Goldmen's transactions in Imatec securities. But this approach is flatly inconsistent with this Court's precedent. For example, in *Edgar* v. *MITE Corp.*, 457 U.S. 624, 102 S.Ct. 2629 (1982), this Court considered the constitutionality of an Illinois anti-takeover statute that required any tender offer for the shares of a target corporation to be registered

with the secretary of state. Under the statute, after a filing for registration was made, the secretary could adjudicate the "substantive fairness" of the tender offer. *Id.* at 627, 2633. The secretary was empowered to deny registration to a tender offer that he found to be substantively unfair under a variety of criteria. MITE Corporation, which was incorporated in Delaware and headquartered in Connecticut, sought to acquire an Illinois corporation whose shareholders were scattered across the nation. MITE challenged the constitutionality of Illinois' anti-takeover statute. This Court evaluated the validity of the law by applying the established two-tiered test for determining the constitutionality of a state regulation under the dormant Commerce Clause.

This Court concluded that Illinois' anti-takeover statute was *per se* unconstitutional because it imposed "a direct restraint on interstate commerce and [had] a sweeping extraterritorial effect." *Id.* at 642, 2640. In so concluding, this Court reasoned that "MITE's offer to [the target's] shareholders, including those in Illinois, necessarily employed interstate facilities in communicating its offer, which, if accepted, would result in transactions occurring across state lines." *Id.* This Court concluded that "[t]hese transactions would themselves be interstate commerce." *Id.* Thus, rather than parse the transaction into component parts — as did the majority opinion here — this Court in *MITE* recognized that the regulation in question implicated interstate commerce because it "directly regulates transactions which take place across state lines." *Id.* at 641, 2640. The fact that an Illinois shareholder in *MITE* accepted a tender offer in Illinois, or the fact that A.S. Goldmen made an offer of Imatec out of New Jersey, does not alter the conclusion that both transactions, because they regulated transactions across state lines, burdened interstate commerce. *See Instructional Systems, Inc.* v. *Computer Curriculum Corp.*, 35 F.3d 813, 825 (1994) (the "fact that application [of a statute] is triggered by in-state

activity does not in itself insulate it from scrutiny under the dormant Commerce Clause, for not all in-state activity is sufficient to justify a law which regulates out-of-state transactions of an interstate actor").

Arizona Corp. Comm'n. v. *Media Prods., Inc.*, 158 Ariz. 463, 763 P.2d 527 (Ariz. App. 1988), is directly on point. In that case, Media Products, a Delaware corporation with its principal offices in Arizona, applied to register its offering to the Securities Division of Arizona, but subsequently withdrew its application — precisely as occurred in the case of A.S. Goldmen here. Media Products' offering was registered with the SEC and registered under the blue sky laws of (and qualified for sale in) more than a dozen states, but not in its home state — precisely as is true here. No solicited sales or offers were made to residents of its home state — also as is true here.

Thus, as here, *Media Products* directly considered the constitutionality of a state securities statute that required the registration of securities in a state in which the securities were not qualified for sale in order for those securities to be sold to out-of-state purchasers. Like the district court here, the court of appeals in *Media Products* found that application of the Arizona statute to prohibit sales of securities from Arizona to residents of the numerous states in which the securities were duly registered "constitutes an improper interference with interstate commerce" in violation of the Commerce Clause. *Media Prods.*, 158 Ariz. at 467, 763 P.2d at 531.

In so concluding, the *Media Products* court reasoned:

> Arizona had no duty to the purchasers whose home states had already determined that the offerings met their own state's standards and had registered the offerings in those states and with the Securities and

> Exchange Commission. To hold otherwise would allow the [Arizona] Commission to have an effective veto over offerings and sales approved by the Securities and Exchange Commission and securities officials from other states, even though no purchases were made by Arizona residents.

Id. at 469, 533. This reasoning applies with equal force here.

There exist no valid distinctions between *Media Products* and the instant case. Here, a broker used its offices in New Jersey to make offers of a security, and to execute sales of that security once its offers were accepted by out-of-state purchasers. Similarly, in *Media Products*, the court specifically pointed out that "the offering of the stock and the sales of the stock were 'from' Arizona." *Media Prods.*, 158 Ariz. at 467, 763 P.2d at 531. The majority opinion below nonetheless attempts to distinguish *Media Products* by arguing that, unlike here, where the securities were sold from A.S. Goldmen's New Jersey offices, the transactions in *Media Products* occurred "entirely outside of Arizona." App. 20a, n.16. The majority urges this distinction by noting that, in *Media Products*, the broker and the purchaser were located outside of Arizona, with "the only connection" between the transaction and Arizona being "that the principal place of business of the seller was located there." *Id.* In the instant case, the majority argues, the broker (A.S. Goldmen) was located in New Jersey, meaning that the offer was made in New Jersey, and should thus be subject to New Jersey regulations. App. 16a.

The majority's distinction of *Media Products* is entirely specious, for two reasons. First, although the majority insists that the issuer's place of business was the only connection between the transactions in *Media Products* and Arizona, the court in *Media Products* concluded exactly

the opposite, stating that "[f]actually this case has considerably more connections within Arizona than the mere maintenance of a principal place of business in this state." *Media Prods.*, 158 Ariz. at 467, 763 P.2d at 531. In fact, the Arizona court of appeals enumerated a litany of such connections with Arizona, including the actions of the Arizona transfer agent and the Arizona escrow agent, as well as the fact that the stock offering agreement closed in Arizona. *See id.* at 465, 529. Second, the majority's distinction of *Media Products* hinges on its unprecedented analysis of territoriality, which parsed A.S. Goldmen's transactions into offer and acceptance. As explained *supra*, this approach ignores the fact that the component parts of the transaction cannot be separated from the effect that the transaction has on interstate commerce.

The effect of the Bureau's application of Section 60 is to preclude *out-of-state* residents from purchasing a product deemed appropriate for sale by their own state regulators. Dissent at 23, App. 23a. The majority's opinion below cannot avoid this fact by parsing A.S. Goldmen's transactions into offer and acceptance. Section 60's substantial extraterritorial effect thus directly burdens interstate commerce and is *per se* unconstitutional. *See Healy*, 491 U.S. at 338-39, 109 S.Ct. at 2500-01.

Section 60, in this regard, is no different from state processing requirements that this Court consistently has found to violate the Commerce Clause. For example, in *Shafer* v. *Farmers' Grain Co.*, 268 U.S. 189, 45 S.Ct. 481 (1925), the Supreme Court struck down a state statute that required in-state inspection and grading of wheat before an out-of-state buyer could purchase wheat. *Id.* at 201 ("subjecting the buying for interstate shipment to the conditions and measure[s of the act] directly interferes with and burdens interstate commerce, and is an attempt by the state to prescribe rules

under which an important part of such commerce shall be conducted"). *See also South-Central Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 104 S.Ct. 2237 (1984) (striking down an Alaska regulation requiring all Alaska timber to be processed within Alaska prior to export); *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844 (1970) (striking down an Arizona statute requiring all Arizona-grown cantaloupes to be packaged within Arizona prior to export); *Toomer* v. *Witsell*, 334 U.S. 385, 68 S.Ct. 1156 (1948) (striking down a South Carolina statute requiring shrimpers to unload, pack and stamp their catch within South Carolina before shipping it to other states); *Foster-Fountain Packing Co.* v. *Haydel*, 278 U.S. 1, 49 S.Ct. 1 (1928) (striking down a Louisiana statute prohibiting exportation of shrimp unless the heads and hulls were removed within Louisiana); *Johnson* v. *Haydel*, 278 U.S. 16, 49 S.Ct. 6 (1928) (striking down an analogous Louisiana statute concerning processing of oysters).

The Bureau here has decreed, through Section 60, that securities must be "processed" — *i.e.*, registered — in New Jersey as a condition to their out-of-state sale. The Bureau's application of Section 60 thus directly regulates the interstate sale of securities and violates the Commerce Clause.

As the foregoing analysis demonstrates, the majority opinion below disregarded established decisions of this Court, under which the Bureau's application of Section 60 is *per se* unconstitutional due to its direct regulation of interstate commerce. We respectfully ask this Court to grant certiorari in order to correct this drastic departure from this Court's established precedents for determining the constitutionality of a state regulation that directly burdens interstate commerce.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

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